

terminated the call, or placed the other party on hold, his communications facilities are no longer in use. That the subscriber initiated the call is irrelevant.<sup>67</sup>

The FBI's proposed interpretation of CALEA would violate all principles of minimization and likely would lead to an unconstitutional result. Once again, it bears noting that a proper interpretation of CALEA here will not hamstring law enforcement. If additional members on a conference call are legitimate targets of an investigation in and of themselves, law enforcement will be free to seek prior authorization to use electronic surveillance of their communications that meets with the standards of the Fourth Amendment and CALEA. But what law enforcement cannot do is expand the scope of a single search warrant to touch upon unrelated and unnamed parties when the subject and his or her facilities are not engaged in covered communications under the guise of claiming that such an expansion is technologically mandated.

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<sup>67</sup> When a subscriber initiates a conference call, a "conference bridge" is allocated to the conversation from a "pool" of similar bridges. These bridges are shared by all subscribers of conference calling service. The "subscriber facility" is the connection between the phone and the subscriber side port of the carrier's switch. Beyond that, only shared resources are used, and thus the law enforcement authority with authority to monitor only the *subject's* conversation is not permitted to trace conversations on those facilities once the subscriber disconnects. The fact that the law enforcement authority hears three parties on a conversation of a tapped line is a function of all the conversations appearing on the targets side of the bridge, not that the law enforcement authority is actually in the middle of the bridge. If the target disconnects, his or her facility also is disconnected; thus, the law enforcement authority has no connection to the conference call bridge.

### 3. Packet Switching

The FBI seeks to obtain the full content of customer communications from carriers using packet switching even when the government is only authorized to intercept addressing or signaling data. The FBI contends that the government would sift through the data and heed only what it has authority to intercept. Not only does this violate the "minimization" requirement of the Fourth Amendment and Title III, but it explicitly violates Section 103(a)(4) of CALEA, which requires the carriers to protect communications not authorized to be intercepted. It also is based on an unrealistic assumption that law enforcement would impose severe self-restraint in processing the information. As one scholar has noted: "in the absence of market discipline, there is no presumption that the government will strike an appropriate balance between disclosure and confidentiality. And the enormous power of the government makes the potential consequences of its snooping far more ominous than those of . . . a private individual or firm."<sup>68</sup>

Congress was concerned with a blurring of the distinction between call-identifying data and call content. Accordingly, it included in CALEA an amendment to the pen register statute to require law enforcement when executing a pen register to use equipment "that restricts the recording or decoding of electronic or other impulses to the dialing and signaling information utilized in call processing."<sup>69</sup> These provisions mean that carriers have an obligation to withhold from law enforcement the content of communications when the

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<sup>68</sup> Posner, *The Uncertain Protection of Privacy by the Supreme Court*, 1979 Sup. Ct. Rev. 173, 176.

<sup>69</sup> Section 207(b), codified at 18 U.S.C. 3121(c). (The wiretap laws set a much higher standard for government access to call content than to dialing information, allowing access to the latter upon

government has only pen register authority to intercept dialing or addressing information. They also show that Congress meant to limit call-identifying information to mean "dialing and signaling information utilized in call processing," placing many other items on the FBI's "punchlist" outside the scope of CALEA.

#### **4. Signaling Information**

The FBI seeks to sweep within the definition of "call-identifying information" other types of signaling information that fall outside the scope of CALEA. The legislative history clarifies that call-identifying information is limited to "electronic pulses, audio tones, or signaling messages that identify the numbers dialed or otherwise transmitted for the purpose of routing calls through the telecommunications carrier's network."<sup>70</sup> The legislative history further clarifies that in pen register investigations, call-identifying information refers to the pulses, tones or messages that "identify the numbers dialed from the facility that is the subject of the court order . . . ."<sup>71</sup> In trap and trace investigations, call-signaling information refers to incoming pulses, tones or messages that "identify the originating number of the facility from which the call was placed and which are captured when directed to the facility that is the subject of the court order . . . ."<sup>72</sup> To emphasize that call-signaling information is limited to pulses and tones that identify incoming or outgoing phone numbers, Congress further stated that "[o]ther dialing tones that may be generated by the sender that are used to

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a mere assertion of relevance to an ongoing investigation.)

<sup>70</sup> H.R. Rep. No. 103-827 at 21.

<sup>71</sup> Id.

<sup>72</sup> Id.

signal customer premises equipment of the recipient are not to be treated as call-identifying information."<sup>73</sup>

The FBI seeks to expand the definition of call-signaling information beyond the signals and tones initiating a call to include signal and tones used "to manipulate the call."<sup>74</sup> For example, the FBI requests that carriers be required to notify law enforcement when the subject has pressed the flash hook indicating call waiting or the placing of a party on hold.<sup>75</sup> The FBI also wants carriers to provide party hold, party join and party drop messages. As these signaling tones do not identify the telephone number dialed by the subject subscriber or the telephone numbers of incoming calls to the subject subscriber, they exceed the scope of CALEA. "In pen register investigations, these pulses, tones or messages identify the numbers dialed from the facility that is the subject of the court order . . . Other dialing tones that may be generated by the sender that are used to signal customer premises equipment of the recipient are not to be treated as call-identifying information."<sup>76</sup>

The FBI also seeks information from carriers on post-cut-through dialing. This occurs, for example, after a subject subscriber had dialed an 800-number to reach a long distance provider and then after the cut-through (the completion of the call to the long distance provider) dials the telephone number of the party being called. For pen registers, the local exchange or wireless carrier registers the numbers dialed to the long distance

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<sup>73</sup> Id.

<sup>74</sup> FBI Petition at 36.

<sup>75</sup> FBI Petition at 34.

provider as the call-identifying information. Digits dialed after the completion of the call to, for example, the long distance provider are treated the same as content of the call.

The digits dialed after the completion of the call to the long distance provider are treated by the long distance provider as call-identifying information. Accordingly, if law enforcement wishes to obtain this information, it is obligated to serve the long distance provider with a pen register order. Post-cut-through dialing is not call-identifying information for the local exchange or mobile service provider, and CALEA does not require such carriers to provide post-cut-through dialing information to law enforcement.

The FBI is simply overreaching in claiming that law enforcement is entitled to the enhanced capabilities sought by the FBI Petition, as the legislative history of CALEA makes clear:

The bill is not intended to guarantee "one-stop shopping" for law enforcement. The question of which communications are in a carrier's control will depend on the design of the service or feature at issue, which the legislation does not purport to dictate. If, for example, a forwarded call reaches the system of the subscriber's carrier, that carrier is responsible for isolating the communication for interception purposes. However, if an advanced intelligent network directs the communication to a different carrier, the subscriber's carrier only has the responsibility . . . to ensure that law enforcement can identify the new service provider handling the communication.

The FBI's Petition should be denied.

### **III. THE COMMISSION ITSELF SHOULD ESTABLISH THE STANDARDS BY WHICH CALEA WILL BE IMPLEMENTED.**

The proceedings leading up to the "industry standard" and the FBI's demand for its "punch list" were effectively closed to non-law enforcement and non-telecommunications industry participants. Those concerned exclusively with protecting the public's vital interest in the right to privacy – including EPIC, EFF and ACLU – did not have an effective voice in those proceedings. As is the case with virtually all closed proceedings, the result was unreliable. Public participation in administrative proceedings is crucially important not only because the public deserves a voice in the implementation of its laws, but also because the broadest diversity of viewpoint will lead to the greatest range of options and ensure that valuable ideas are not arbitrarily excluded. This did not occur in the past proceedings, but certainly should in future proceedings.

To ensure that CALEA is implemented in a manner that is faithful to Congress' true intent in crafting the statute, we recommend that the Commission commence a new rulemaking proceeding.<sup>77</sup> This proceeding should deal *de novo* with the specific issue of what technological items are appropriately covered by CALEA. It should follow traditional Commission and Administrative Procedure Act mandates for transparency and openness applicable to all parties submitting petitions or comments to the Commission. If panels of experts are used to inform the process, any meetings of such experts should be noticed, open

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<sup>77</sup> The legislative history of CALEA supports this proposal. "The FCC may also define the assistance obligations of the telecommunications carriers . . . This section is also intended to add openness and accountability to the process of finding solutions to intercept problems. Any FCC decision on a standard for compliance with the bill must be made publicly."

and *all* parties – not just the industry and law enforcement – should have the right to specify experts to serve on such panels.

Such a procedure will result in a full record and a fair result. Implementation of CALEA is just as important to the polity as implementation of the Telecommunications Act of 1996, which has been accomplished "on the record" with a highly developed factual and legal basis.<sup>78</sup> Protection of privacy rights deserves the same procedural protections as implementation of competition in telecommunications markets. We urge the Commission to deny the FBI Petition, reject the industry "standard" and commence a proceeding independently to craft the true standards that will be used to implement CALEA.

### CONCLUSION

The FBI Petition represents an invitation to the Commission impermissibly to expand the scope of CALEA. We urge the Commission to reject this invitation. Justice Brandeis set out with clarity some 70 years ago the scope of the interests at stake today:

The evil incident to invasion of the privacy of the telephone is far greater than that involved in tampering with the mails. Whenever a telephone line is tapped, the privacy of the persons at both ends of the line is invaded, and all conversations between them upon any subject, and although proper, confidential, and privileged, may be overheard. Moreover, the tapping of a man's telephone line involves the tapping the telephone line of every other person whom he may call, or who may call him. As a means of espionage, writs of assistance and general warrants are but puny instruments of tyranny and oppression when compared with wiretapping.<sup>79</sup>

These interests are too important to the American public to be held hostage to a standard established in a closed proceeding between law enforcement and the industry. Rather, these

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<sup>78</sup> The FBI, therefore, should be obligated to file with the Secretary a summary of any meetings it holds with the Commission's staff.

interests deserve to be protected in an open and fair proceeding initiated by the independent regulatory agency that Congress entrusted with this crucial role. We urge the Commission to reject the FBI Petition and commence a full and open rulemaking proceeding to implement CALEA without reference to the previous agreements among industry and law enforcement.

Respectfully submitted,



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